BEFORE

THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2014-346-WS - ORDER NO. 2021-_____

_____, 2021

IN RE:	Application of Daufuskie Island Utility Company, Inc. for Approval of an Increase for Water and Sewer Rates, Terms and Conditions	))))	DIUC'S **[PROPOSED]** ORDER ON REPARATIONS AND OTHER MATTERS

SUMMARY OF ISSUES AND RELIEF REQUESTED

Currently before the Commission is a request by the Applicant, Daufuskie Island Utility Company, Inc. ("DIUC" or "the Company"), for an order approving two surcharges that the Company asserts are necessary to afford DIUC its constitutionally guaranteed right to collect rates that meet minimum constitutional standards of a reasonable return on investment. This rate increase proceeding was initiated by DIUC over six years ago in July of 2015, and docket remains open pending resolution of this issue.

DIUC asserts the insufficient rates allowed by Commission Order 2015-846's increase of only 43%, which was mitigated but not corrected by Commission Order 2018-68's 88.5% increase, have not provided DIUC its constitutionally guaranteed just compensation for its property used and its operating expenses, given the grossly excessive duration of this rate proceeding. *See* Order 2015-846, *reversed and remanded by DIUC v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) and Order 2018-68, *reversed and remanded by DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019)*, reh'g denied* (Sept. 27, 2019).

DIUC asks the Commission to recognize that the delay of six years to arrive at proper rates in this case constitutes a grossly excessive delay and that DIUC is entitled to reparations. The specific relief requested is an order that:

1. DIUC may implement a surcharge to collect the 108.9% increase it should have been allowed beginning on October 1, 2017, through March 1, 2021. A surcharge may be added to customer bills to recover the shortfall in revenues and return on investment for that period of time, with interest at the allowed 9.31% equity return.

2. Because the 108.9% increase was not allowed to begin on October 1, 2017, DIUC gave certain credits/refunds to customers in their January 1, 2018, billing. DIUC may implement a one-time surcharge for reimbursement of the credit/refund made to the customers with the January 1, 2018, billing, with interest at the allowed 9.31% equity return.

DIUC's request for reparations is meritorious and the amounts at issue are significant. The refund/credit made to the customers by DIUC on January 1, 2018, totaled of $232,542. *See Exhibit B*, DIUC Submission in Support of Reparations, May 17, 2021, at ¶1. The revenue shortfall in DIUC's combined water and wastewater billings since the January 1, 2018, billing for the last quarter of 2017 until the March 1, 2021, effective date of the 108.9% increase per the Settlement Agreement, totals $668,641. *Id.* at ¶2. DIUC proposes to use a rate of 9.31% for interest on the undercharges, which is the equity rate allowed by the Commission in this case, and is significantly less than the 12% interest rate DIUC was required to apply to its refunds. *Id.* at ¶3. In total, DIUC estimates if these charges are not billed until January 1, 2023 (assuming time for any appeals of this Order), the $668,641 revenue shortfall produces carrying costs of $297,309 for a total reparation of $965,951; the carrying cost related to the refund/credit reimbursement of $232,542 produces $130,370 for a total refund/credit of $362,912. *Id*. at ¶4. Assuming either side will appeal the Commission's resolution of this issue resulting in final implementation of the surcharges as late as January 1, 2023, the total lost revenue and carrying costs DIUC stands to forfeit is estimated at $1.3 million. The Commission notes that this amount is greater than one-half of one year of DIUC's annual revenue under the Settlement Agreement and current 2021 Rates. *See* Settlement Agreement at *Exhibit 1*, Settlement Rates and Revenues (Billing Analysis) and Settlement Agreement at *Exhibit 2*, Operating Statement (Water and Wastewater Combined) (illustrating the resultant operating experience based on the application's 2014 test year). By adopting the Settlement Agreement, the Commission approved these rates, referred to in the Settlement Agreement as the 2021 Rates. *See* Order 2021-132 and Settlement Agreement attached thereto ("The 2021 Rates are designed and intended to generate $2,267,714 of annual revenue….") There can be no question that losing an amount equal to one-half of its annual operating revenue has a

significant, negative impact on DIUC.

Having reviewed the extensive record of filings, testimony, and pleadings in this docket as well as hearing transcripts and the South Carolina Supreme Court's detailed decisions reversing Commission Orders 2015-846 and 2018-68, we agree with DIUC and grant its request for reparations. The specifics of the two surcharges and calculation of the same are addressed in the concluding portions of this Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Water and Sewer Service on Daufuskie Island.

In 1985, International Paper Realty Corporation of South Carolina ("IP") and The Melrose Group Limited Partnership ("Melrose") owned or had control over approximately 1,800 acres of land on Daufuskie Island in Beaufort County, South Carolina. While each developer was establishing separate water and wastewater utility systems in contemplation of developing their respective properties, they recognized the benefit of constructing a consolidated wastewater treatment plant and the desire of DHEC to centralize treatment facilities where feasible. *See* May 2015 Report of Capital Improvements, *Exhibit* B, Guastella Direct Testimony, *Exhibit 7* to Transcript of Proceedings, October 28, 2016. Accordingly, in addition to IP establishing the Haig Point Utility Company, Inc. ("HPUC") and Melrose establishing the Melrose Utility Company ("MUC"), HPUC and MUC also entered into a joint venture establishing the Haig Point/Melrose Wastewater Treatment Company, Inc. ("HPMWWTC"). The HPMWWTC joint venture then constructed a wastewater treatment facility on a 5.85 acre site on Daufuskie Island. The treatment facility had a capacity of 640,000 gallons per day, for which it was agreed that the construction and operating costs would be shared 60% by HPUC and 40% by MUC**.** *Id.*

DIUC is the successor-in-interest to HPUC by virtue of a stock purchase transaction.[1] Shortly after DIUC began operations on the Island, MUC stopped paying its 40% share of the costs for the shared wastewater treatment facility leaving DIUC to cover all the sewer plant costs. DIUC covered those cots and assumed responsibility for operations so that MUC sewer customers would not lose service. This translated to an immediate 25% annual shortfall of DIUC's revenues. *See* May 2015 Report of Capital Improvements. Next, the owners of MUC abandoned its water service operations and filed for bankruptcy. To prevent MUC's former customers from going without water service, DIUC assumed servicing the customers; however, DIUC was not compensated for this effort, further increasing DIUC's cash shortage. *See* Transcript of Proceedings, October 28, 2015 at p.182. In 2009, DIUC was able to officially acquire MUC and its merger into DIUC was approved by the Commission on October 28, 2009. *See* Order 2009-760, October 28, 2009. DIUC is now the only water and wastewater utility on Daufuskie Island.

DIUC operates as a Class B water and wastewater utility, as classified under the Uniform System of Accounts published by the National Association of Regulatory Utility Commissioners ("NARUC"). DIUC's operation of a water and sewer utility on Daufuskie Island is made difficult by multiple factors, in addition to ill-timed expansion to absorb the facilities and services that MUC planned to handle. The most notable issue is that Daufuskie Island is accessible only by boat, which drastically increases costs of doing business on the island. *See* Transcript of Proceedings, October 28, 2015 at p.180. Also, the number of customers who require DIUC's services is limited by the size of the island and the stage of development which, in this instance,

[1] The stock purchase of Haig Point Utility Company, Inc. (now DIUC) by CK Materials LLC on July 9, 2008, from Haig Point, Inc. (formerly International Paper Realty Corporation of South Carolina) was approved by the Commission. The stock of DIUC was subsequently transferred from CK Materials, LLC to Daufuskie Island Holding Company, LLC in 2013 when the Commission approved DIUC's financing with SunTrust Bank.

means each customer must bear a greater percentage of operational costs. *Id.*

The 2015 Rate Application.

On June 11, 2015, DIUC initiated this matter by applying to the Public Service Commission (the "Commission" or "PSC"), for approval of a new schedule of rates and charges for water and sewer service ("the Application").[2] The Application was filed pursuant to S.C. Code Ann. Section 58-5-240 and 10 S.C. Code Ann. Regs. 103-712.4.A and 103-512.4.A. In its Application, DIUC utilized a historic test year – the twelve months ending December 31, 2014, with known and measurable adjustments for 2015 expectations. DIUC requested an increase in revenues for combined operations of $1,182,301, consisting of a water revenue increase of $590,454 and a sewer revenue increase of $591,847. The revenue increase utilizes a return on equity ("ROE") of 10.5% based on the rate of return on rate base methodology and a 2014 historical test year. Tariff changes to bring the rates between the Haig Point and Melrose communities to uniformity were also requested.

On July 23, 2015, the Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, (collectively "Intervenors" or "POAs") filed a Petition to Intervene, which this Commission granted. The South Carolina Office of Regulatory Staff ("ORS") also filed its appearance in the action. The POAs are represented by Mr. John J. Pringle, Jr., Esquire and ORS is represented by Andrew M. Bateman,

[2] The rates in effect at the time of the Application were those established in DIUC's prior rate proceeding, Docket No. 2011-229-WS, which was based upon a test year ending June 30, 2011. That case was resolved by a settlement. In Commission Order No. 2012-515, the Commission approved a settlement inclusive of all the parties to that proceeding (which are the same parties to this proceeding). As a compromise, DIUC agreed in that settlement to a negotiated revenue increase of $291,485; a $5 million rate base; an operating margin of 16.64%; and a Return on Equity of 8.81%. DIUC also agreed not to seek another rate adjustment prior to July 1, 2014. *See* Order 2016-50, Order Denying Reconsideration, February 25, 2016.

Esquire. Counsel for the DIUC is Thomas P. Gressette Jr., Esquire.

During the months following DIUC's initiation of this matter, the parties participated in extensive discovery. DIUC was required to respond to in excess of 300 discovery requests, to review the direct testimonies of nine witnesses, to prepare rebuttal testimony and surrebuttal testimony, and to prepare for the hearing on its Application. See Rebuttal Testimony of Guastella, Transcript of Proceedings, October 28, 2015 at p.218.

A hearing on the Application was scheduled for October 28, 2015. On the afternoon of October 27, 2015, the day before the scheduled hearing, the Intervenors served and filed a document captioned as a "settlement agreement." Pursuant to the purported "settlement agreement," ORS and the Intervenors agreed to stipulate to "all of the adjustments made by the ORS, with the exception that the ORS amended its bad debt allowance to utilize the allowance proposed by [DIUC] in its Application. No other changes were made by ORS in reaching the Settlement." Letter from Pringle to Hon. Boyd with Settlement Agreement, October 27, 2015.

DIUC objected to the purported "settlement agreement" asserting that the Commission should not consider it, take notice of it, or admit it into the record. *See* Transcript of Proceedings, October 28, 2015 at p.42. DIUC objected on the grounds that the "settlement agreement" endorsed an even lower revenue number than originally proposed by ORS; that any agreement between ORS and Intervenors was irrelevant to the Application since the Company did not know about, much less agree to, the terms of the purported "settlement agreement"; and that admission of this "settlement agreement" was prejudicial to the Company. *Id.* DIUC's counsel further explained that because DIUC was not a party to the agreement, the document did not resolve any issue(s) presented by DIUC's Application; the document merely reported that two parties to the proceeding have negotiated among themselves and agree that they will oppose DIUC's Application in a

unified manner. *Id.*

The Commission overruled DIUC's objection and accepted the Settlement Agreement into the record. *See* Transcript of Proceedings, October 28, 2015 at p.48. The hearing proceeded and testimony of multiple witnesses was presented by DIUC, ORS, and the Intervenors.

On December 8, 2015, the Commission entered Order 2015-846 Approving Settlement Among Certain Parties and Ruling on Application for Adjustments and Rates. On December 21, 2015, DIUC filed a Petition for Reconsideration and/or Rehearing. In its Petition for Reconsideration, DIUC addressed the adjustments for property taxes; management fees; rate case expenses; bad debts; and rate base, including evidentiary matters as well as the Commission's failure to include the values of DIUC's elevated storage tank and related facilities and other utility plant in service. *Id.* The Petition for Reconsideration asserted that the Order's adjustments were without factual foundation and ignored measurable expenses and the rate of return and operating margins stated in the Order are entirely illusory. The Petition also stressed DIUC's position that the "approved rates do not provide DIUC sufficient income to pay debt service (principal and interest) on [its] existing Suntrust Bank loans and to pay necessary operating expenses."

By Order No. 2016-50 dated February 25, 2016, the Commission denied DIUC's Petition for Reconsideration and/or Rehearing, and DIUC appealed to the South Carolina Supreme Court ("Supreme Court").[3] *See* Order 2016-50.

Appeal of Order Approving Settlement Among Certain Parties - *DIUC I*.

On appeal, DIUC asked the Supreme Court to consider Order 2015-846's adoption of the ORS-Intervenors Settlement Agreement and other evidentiary rulings by the Commission. DIUC

[3] The two opinions issued by the Supreme Court in this matter are included in the Commission record. They may also be found at *DIUC v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (hereinafter "*DIUC I*") and *DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019)*, reh'g denied* (Sept. 27, 2019) (hereinafter "*DIUC II"*).

also appealed Order 2015-846's ruling upon five adjustments that were included in the Settlement Agreement between ORS and the Intervenors. DIUC asserted that by adopting the adjustments in the Settlement Agreement, Order 2015-846 improperly rejected revenue calculations requested by DIUC.

The Supreme Court heard oral argument on the appeal on December 14, 2016, and on July 26, 2017, issued its Opinion. In its Opinion, the Supreme Court ruled Order 2015-846 "contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission." *DIUC I*, 420 S.C. at 316, 803 S.E.2d at 286. Accordingly, the Court reversed and remanded the matter "for a new hearing as to all issues." *Id.* The issues referred to by the Court are Order 2015-846's adjustments to Property Taxes, Plant In Service, Bad Debts, Management Fees, and Rate Case Expenses.

Although the Supreme Court did not individually analyze two of the five adjustments, the Court did explicitly address three adjustments "in order to provide guidance to the Commission on remand." *Id.* Those adjustments were to Property Taxes, Plant In Service, and Bad Debts.

Remand and Rehearing After *DIUC I*.

Following remand and prior to rehearing by this Commission, DIUC filed Applicant's Proposal for Procedure Following Remand and Expedited Hearing on October 4, 2017. In that Proposal, DIUC explained its position that the Supreme Court's Order did not require or authorize any additional discovery for the matters to be addressed on remand. *Id.* DIUC cited the high costs of the original proceeding and appeal as well as the mounting costs of the rate case following the appeal. Intervenors and ORS responded by asserting their entitlement to discovery without any limitation.

On October 11, 2017, Standing Hearing Officer David Butler issued Directives 2017-59-

H and 2017-60-H finding that "since the Commission will hold a new hearing on all … issues, the Commission's discovery rules are clearly applicable." On October 16, 2017, DIUC filed a Motion to Reconsider Directives 2017-59-H and 2017-60-H with Affidavit of John F. Guastella explaining to the Commission that a decision on the Application was necessary prior to the conclusion of 2017, because the bonds this Commission ordered so that DIUC could collect its requested rates pending appeal would expire on December 31, 2017, and DIUC was not able to obtain renewals of the bonds:

> DIUC is not able to renew its existing bonds or obtain additional bonds for rates charged after December 31, 2017. This fact is demonstrated DIUC's recent efforts and my experience in attempting to secure previous bonds.
>
> Because of the impossibility of obtaining bonds and the threat to DIUC if it not allowed to collect rates greater than those allowed by Order 2015-846, DIUC requires this matter be set for hearing as soon as possible so that a decision could be issued by the Commission prior to December 31, 2017.

Affidavit of Guastella at p. 3. In response to the Motion to Reconsider and DIUC's prompt filing of its prefiled testimony, Standing Hearing Officer Butler issued Directive 2017-61-H revising the schedule to allow for rehearing and decision of this Commission prior to December 31, 2017.

The parties participated in discovery and prefiled testimony of their witnesses. The rehearing was convened on December 6, 2017, in the Commission Hearing Room located at 101 Executive Center Drive in Columbia, South Carolina. DIUC was represented by G. Trenholm Walker, Esquire, and Thomas P. Gressette, Jr., Esquire. The POAs were represented by John J. Pringle, Jr., Esquire and John F. Beach, Esquire. ORS was represented by Andrew M. Bateman, Esquire, and Jeff Nelson, Esquire.

On December 20, 2017, the Commission issued a one-page order approving a $950,166 rate increase, indicating that a full order would be issued at a subsequent time. On January 31, 2018, the Commission entered its decision, docketed as Order No. 2018-68 ("Order on

Rehearing"). DIUC filed a timely Petition for Reconsideration and/or Rehearing on February 20, 2018, asserting that while the Order on Rehearing addressed many of the complex issues presented in this case and significantly reduced the outstanding questions, the Commission erred in its downward adjustment to DIUC's proposed Rate Case Expenses, Rate Base/Utility Plant In Service, and Accumulated Depreciation/Depreciation Expense. By Order No. 2018-346 dated May 16, 2018, the Commission denied DIUC's Petition for Reconsideration and/or Rehearing.

Appeal of Order on Rehearing - *DIUC II*.

On June 13, 2018, DIUC served its Notice of Appeal of Order No. 2018-68 and Order No. 2018-346 (collectively referred to herein as "Order 2018-68" and "Order on Rehearing"). The Office of the Clerk of the Supreme Court assigned this second appeal Appellate Case No. 2018-001107.[4]

The issues raised by the appeal were whether the reliable, probative evidence in the record justified the Commission's rejection of the evidence DIUC presented regarding its Rate Case Expenses and Rate Base/Utility Plant In Service. The appeal sought reversal of the Commission's Order on Rehearing asserting that on remand ORS and the Commission's Order improperly disallowed $542,978 of Guastella Associates ("GA") Rate Case Expenses and that on remand ORS applied a higher, retaliatory standard to consideration of GA's invoices. Second, DIUC asked the Supreme Court to reverse this Commission decision to adopt ORS's position on removing $699,631 from DIUC's Rate Base/Utility Plant In Service.

Oral argument was held before the Supreme Court on April 18, 2019. At oral argument counsel was questioned by members of the Court regarding both issues on appeal – the Order on Rehearing's exclusion of Rate Case Expenses and the Order on Rehearing's reduction to Utility

[4] This second appellate proceeding and decision are referred to as *DIUC II*. *See DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019).

Plant In Service. *See* Video Recording of April 18, 2019, Oral Arguments (available online at http://media.sccourts.org/videos/2018-001107.mp4). The Court also examined ORS counsel regarding the higher standard applied by the agency during the remand proceedings. The Court summarized in its decision as follows:

> DIUC argues ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order. At oral argument on this second appeal, when pressed by the Court to respond to DIUC's "retaliation" argument, appellate counsel for ORS conceded a heightened standard had been employed. Counsel stated, "Was it a higher standard than was previously applied? It certainly was a different standard," and "I don't believe it was a lesser standard, you are correct." Pressed further, counsel stated, "You're right. There is a difference ... [in] the way we handled the methodology ...." Finally, a Justice of the Court challenged counsel, "The reason that [the rate case expenses] were paid the first go around ..., but disallowed the next time, is because of the higher level of scrutiny." Counsel responded, "At the end of the day I think that's a fair characterization."

DIUC II, 427 S.C. at 460, 832 S.E.2d at 573.

On July 27, 2019, the Supreme Court entered its decision reversing and remanding the matter back to the Commission. The strongly worded opinion expressed the Court's concerns. The Court categorized ORS's positions and its actions on remand as "deeply troubling" and the Court chastised ORS for its "misconduct," stating:

> We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, and of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

Reversing, the Court remanded the matter to this Commission for a third hearing. ORS and the Intervenors filed petitions for rehearing. The Supreme Court denied the petitions and remitted the matter to the Commission on September 27, 2019.

Second Remand for Rehearing After *DIUC II*.

On November 15, 2019, counsel for DIUC filed a written request asking the Commission

to take immediate action following the second remand. *See* Letter, Gressette to Hon. Boyd, November 15, 2019. In response, the Commission sought input from ORS. *See* Order 2019-824, December 4, 2019. Responding by letter dated December 6, 2019, ORS stated its position that an additional hearing was required but that if at that third hearing "DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings." Letter, Bateman to Hon. Boyd, December 6, 2019. The Intervenors, however, took the position that Commission could not "rule on remand absent additional documentary or testimonial evidence to support its decision." Letter, Pringle to Hon. Boyd, January 16, 2020.

On January 16, 2020, the Commission convened to hear from the parties as to how to handle the second rehearing of this case. After receipt of the transcript of that hearing, on April 1, 2020, DIUC filed is Supplemental Brief Regarding Second Remand. DIUC opposed any further discovery and pointed to the age of the case and DIUC's financial need for a final ruling in this matter:

> This rate case is based on data from a 2014 test year, only adjusted for limited known and measurable changes, so the duration of this case will ultimately benefit the ratepayers whose charges in 2020 and 2021 will essentially be based on DIUC's operating costs from six years prior in 2014. That means that even though the POAs have not succeeded on a single issue before the Supreme Court, their demands for hearings to retry the same matters have allowed them to extend this case so that whatever rates are ultimately put in place will be based on a six-year-old test year.

DIUC Supplemental Brief Regarding Remand at p. 6. Further, the Supplemental Brief explained DIUC's position that it had "been damaged by and is in an inferior position because of the incredible delays in obtaining a proper rate ruling." *Id.* at p. 17.

On April 14, 2020, DIUC filed a Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand. The Motion attached a 24-page proposed order. When no response to the motion was filed by any party to the proceeding, "DIUC respectfully [requested]

the Commission consider the Motion at its earlier opportunity and, as set forth therein, grant the relief requested including entry of the proposed order." Letter, Gressette to Hon. Boyd, May 4, 2020.

DIUC's Proposed Order sought to address DIUC's perceived errors in this Commission's Order on Rehearing, specifically the decisions regarding DIUC's Annual Revenue, Rate Case Expense and Rate Base / Utility Plant in Service. The Proposed Order also explained DIUC's request that the Commission approve imposition of surcharges to remedy the unconstitutional impact of Orders 2015-846 and 2018-68. DIUC asserted the correction should be made on the basis that the 108.9% rate increase should have been in effect for service provided from October 1, 2017, through March 31, 2020, instead of the 88.5% rate increase permitted by the Order on Rehearing. With respect to the reversal of the refund/credit made to the customers on January 1, 2018, DIUC requested that in order to mitigate the impact on the customers, a separate surcharge be billed to the customers.

On May 20, 2020, the Commission entered Order 2020-382, which held DIUC's Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand in abeyance and instructed the parties and Commission staff to confer as necessary to schedule testimony deadlines for "a limited hearing … to consider rate case expenses, plant in service, and reparations." The Order also instructed Commission staff to "confer with the parties to formulate a procedural schedule and hearing date." *Id.* The parties conferred, proposed testimony deadlines, and pursuant to Order 2020-48H a second rehearing was scheduled for Thursday, September 3, 2020. *See* Order 2020-48H, June 9, 2020.

On June 16, 2020, DIUC filed the Second Rehearing Testimony of John F. Guastella with corresponding index and exhibits. On July 7, 2020. ORS filed the Second Rehearing Direct

Testimony of Mark Rhoden as well as the Second Rehearing Direct Testimony and Exhibits of Dawn M. Hipp. Despite having asserted the Commission should take additional evidence before issuing an order following the second remand (*see* Letter, Pringle to Hon. Boyd, January 16, 2020), the Intervenors did not prefile any testimony or exhibits.

Prior to the second rehearing scheduled for September 3, 2020, ORS served additional discovery on DIUC, filed a letter requesting that DIUC provide additional notice to its customers, and then filed a Motion for Clarification and to Hold the Remaining Procedural Due Dates in Abeyance Pending a Commission Order. Pursuant to Order 2020-69H, entered on July 16, 2020, the remaining pre-filing deadlines were held in abeyance as ORS requested. Over the next few months the parties briefed and presented oral argument to the Commission regarding several procedural issues related to the scope of discovery and DIUC's position that it had provided ample evidence regarding DIUC's requested Rate Case Expenses.

In December 2020, DIUC filed updated discovery responses required by the Commission. Then, via letter filed January 7, 2021, DIUC reported the parties had conferred and jointly requested a hearing be scheduled for the Commission to hear testimony and evidence on the issues remaining after the second remand from the Supreme Court. *See* Letter, Gressette to Hon. Boyd, January 7, 2021. Pursuant to several directives issued by the Standing Hearing Officer, deadlines were set for the filing of remaining testimony and a hearing was scheduled for March 2 and 3, 2021.

The 2021 Settlement Agreement.

Prior to the scheduled second rehearing, the parties reached agreement as to settlement terms which they jointly proposed to the Commission by the filing of a Settlement Agreement on February 18, 2021, and a Proposed Consent Order Approving Settlement on February 19, 2021.

DIUC and ORS also both submitted prefiled testimony in support of the proposed settlement and consent order.

On February 25, 2021, the Commission convened a settlement hearing wherein the Commission considered the Settlement Agreement and the testimony of settlement witnesses for DIUC and for ORS. Via Order 2021-132, entered March 30, 2021, the Commission approved the Settlement Agreement finding it is "just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." Order 2021-132 at p. 7. Pursuant to the Order, DIUC was permitted to "implement the 2021 Rates, (as defined in the Settlement Agreement and reflected in the attachments thereto) for services beginning March 1, 2021," and to "include the same in its April 1, 2021, quarterly billing."[5] *Id*.

The substantive terms of the Settlement Agreement are:

> **Annual Revenue**:
> The parties agree to implementation of the 2021 Rates as set forth in the Settlement Agreement and its exhibits. The 2021 Rates are designed and intended to generate $2,267,714 of annual revenue for DIUC [ie, the originally requested 108.9% increase].
>
> **Rate Case Expenses:**
> In addition to the $272,382 of rate case expenses previously recommended for recovery by ORS, approved by the Commission in Order No. 2018-68, and currently reflected in rates charged to customers, the Parties agree to recovery of $542,978 for Guastella Associates' rate case expenses incurred by DIUC through September 30, 2017, and supplemental legal rate case expenses of $95,430, with both amounts to be amortized over a three (3) year period.
>
> **Rate Base / Utility Plant in Service**:
> DIUC's Application included $8,139,260 of reported used and useful facilities included in Utility Plant in Service. Commission Orders 2015-846 and 2018-68

[5] In compliance with directions of the Commission, on March 30, 2021, DIUC sent to each affected customer (by U.S. Mail and/or by electronic mail to those customers who have agreed to receive notice by electronic mail) a copy of the updated notice and schedules. A certification of that mailing was filed in the docket.

both reduced that amount by $699,361. DIUC will delay seeking recovery of the corresponding $699,361 until its next rate filing, and the Parties agree to reserve their positions as to the $699,361 reduction to Utility Plant in Service for consideration in DIUC's next rate case.[6]

Reparations:
DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. ORS and the Intervenors disagree, so the settlement contains a procedure whereby after the Commission's decision regarding the proposed settlement agreement, the parties can brief the matter to the Commission for its further determination in this case.

Order 2021-132, Settlement Agreement at pp. 2-4.

As indicated by the terms of the Settlement Agreement, ORS and the Intervenors agreed that the settlement "serves the public interest," as that term is defined by S.C. Code Ann. § 58-4-10(B), and that it is "is reasonable, in the public interest, and in accordance with law and regulatory policy." Settlement Agreement at pp. 5-6. Likewise, in Order 2021-132, this Commission found that "the Settlement Agreement is just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." Order 2021-132 at p. 7.

The Settlement Agreement also includes a procedure whereby the parties agree to "present their respective positions to the Commission regarding the DIUC request for reparations."

[6] Even if the parties were in agreement about including the $699,361 in Utility Plant In Service, that would result in rates that exceed the noticed revenue of $2,267,722 [aka the 108.9% increase].

Settlement Agreement at p. 4. The March 30, 2021, Notice to Customers mailed by DIUC summarized the reparations issue:

> In DIUC's opinion, the 108.9% increase should have been allowed beginning on October 1, 2017, through March 1, 2021, so DIUC seeks "reparations" through one-time surcharges added to customer bills to recover the shortfall in revenues and return on investment for that period of time, with interest at the allowed 9.31% equity return. Because the 108.9% increase was not allowed to begin on October 1, 2017, DIUC gave certain credits/refunds to customers in their January 1, 2018, billing. DIUC seeks reimbursement for the credit/refund made to the customers with the January 1, 2018, billing. DIUC is asking the Commission to allow recovery of those credits via a separate one-time surcharge with interest at the allowed 9.31% equity return.

Notice at p. 1.

In the Settlement Agreement the Parties also agreed that this proceeding, Docket No. 2014-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary. *See* Settlement Agreement at pp. 3-4. The procedure for addressing the reparations issues further contemplates that "if the Commission issues an Order approving DIUC's proposed method of reparations and timing of billing surcharges, DIUC shall submit the calculation of the amount of the surcharges to individual customers for review by ORS." Settlement Agreement at p.5. After those submissions, if "there is a dispute as to the amount of the surcharges and their implementation, the Parties agree to proceed expeditiously to an evidentiary hearing to determine the appropriate amount of surcharges." *Id.*

The parties did, in fact, submit their respective submissions on the reparations issue. Via Order 2021-581 entered August 25, 2021, the Commission requested the parties submit proposed orders and instructed the Office of the Clerk to set the matter for oral argument.

On November 30, 2021, the Commission heard oral arguments from the parties on the matters addressed in Paragraph 8 of the Settlement Agreement, generally what has been referred to as reparations. Due to public health concerns and the COVID-l9 pandemic, the Commission

conducted the scheduled hearing in this matter virtually beginning at 10:00am with the Honorable Justin T. Williams, Chairman, presiding in the Commission's hearing room located at 101 Executive Center Drive in Columbia, South Carolina, with the Honorable Carolyn L. Williams, the Honorable Stephen "Mike" Caston, the Honorable Thomas J. "Tom" Ervin, the Honorable Headon B. Thomas, and the Honorable Delton W. Powers, Jr. The Honorable Florence P. Belser is recused in this Docket.

ANALYSIS

Having reviewed the extensive record of filings, testimony, and pleadings in this docket as well as hearing transcripts and the South Carolina Supreme Court's detailed decisions reversing Commission Orders 2015-846 and 2018-68, the Commission agrees that DIUC is entitled to collect the requested reparations. This rate application proceeding has been pending since 2015 and the test year for the increase requested is based on historical financials from 2014. The extended duration of this case cannot be said to be the fault of the Applicant, particularly given that DIUC prevailed on both appeals that contributed significantly to the delays in obtaining a final order setting sufficient rates. Further, the Commission has, upon consent of all the parties, found that the originally requested 108.9% increase that DIUC has consistently pursued in this matter, including through both appeals, as incorporated in "the Settlement Agreement is just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." Order Approving Settlement Agreement and Further Procedure, Order 2021-132, at p. 7.

Having found the 108.9% increase is just, fair, and reasonable, this Commission cannot ignore the fact the record as a whole demonstrates DIUC did not cause the six-plus year delay[7] it

[7] S.C. Code § 58-5-240(C) requires this "Commission shall rule and issue its order approving or disapproving [a rate increase application] in full or in part within six months after the date the schedule is filed."

took for the Applicant to achieve that increase and the Commission cannot require DIUC to simply forego the revenues it could not collect while DIUC worked through the appellate courts and this Commission to ultimately convince the ORS and Intervenors to agree to the increase those parties had so vigorously opposed. The grossly excessive time it took to correct errors of the Commission's orders certainly entitle DIUC to relief, and the proposed surcharges are a reasonable and just tool to address the unique circumstances presented in this case.

1. ORS AND INTERVENORS NOW AGREE DIUC'S ORIGINAL APPLICATION SOUGHT A JUST AND REASONABLE RATE; DIUC SHOULD NOT BE PUNISHED BY THE GROSSLY EXCESSIVE DELAY IN FINALLY OBTAINING SUFFICIENT RATES.

In its original Application, DIUC sought a 108.9% increase over the existing rates from DIUC's last application in 2010. The increase would generate additional revenue of $1,182,301, which would have increased DIUC's total adjusted revenue to $2,267,722. ORS and the Intervenors opposed that increase and convinced this Commission to accept a Settlement Agreement allowing only a 43% rate increase. *See* Order No. 2015-846. DIUC appealed the order. On appeal the Supreme Court flatly rejected the ORS-POA Settlement Order finding:

> The Order's reliance on the ORS exclusion of equipment from rate base was totally "unsupported by the substantial evidence in the record."
>
> The Order's adoption of the ORS-POA refusal to allow DIUC to collect revenue sufficient to cover its known tax obligations was "directly contrary to the evidence in the record."
>
> When the only evidence in the record showed DIUC had been unable to collect well over $100,000 in bad debt, the Order's adoption of the ORS-POA suggestion of only $30,852 for DIUC's bad debt expense was "unsupported by the evidence in the record."

DIUC I, 420 S.C. 305, 317-20, 803 S.E.2d 280, 286-88 (2017).

The Supreme Court reversed and remanded. Upon rehearing ORS and the Intervenors continued to oppose the Application's requested increase of 108.9%, and even sought further

discovery over DIUC's objections thereby increasing DIUC's rate case expenses. At the eventual rehearing ORS and the Intervenors continued to oppose DIUC's requested 108.9% increase and DIUC's proposed revenue requirement. The Commission again accepted ORS's and the Intervenor's positions causing DIUC to expend even more resources and time to appeal and ultimately obtain another reversal from the Supreme Court.[8]

In the second appeal DIUC challenged the Order on Rehearing and its 88.5% increase in rates, explaining the Order on Rehearing subjected DIUC to a rate structure that is unconstitutionally insufficient to allow DIUC to collect rates that meet the minimum standards required by law. *See* App. Case No. 2018-001107, Appellant's Brief at 12 (citing *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va.*, 262 U.S. 679, 690, 43 S. Ct. 675 (1923) (explaining that where the rates charged by a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service … their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment")).

DIUC explained to the Supreme Court that "ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order." *DIUC II*, 427 S.C. at 460, 832 S.E.2d at 573. The Supreme Court

[8] At the time DIUC filed its notice of the second appeal in June of 2018, this proceeding was already three years old. The Commission is very sensitive to the fact that S.C. Code § 58-5-240(C) requires this "Commission shall rule and issue its order approving or disapproving [a rate increase application] in full or in part within six months after the date the schedule is filed." Three years, much less the six years this case has been pending, is excessively longer than the six months prescribed by the Legislature for ruling on an original filing. While the Commission ruled initially within six months by approving the ORS-POAs Settlement Agreement via Order 2015-846, on remand following both *DIUC I* and *DIUC II* there was certainly not a decision within six months.

was not pleased with the events of remand:

> These retaliatory actions by ORS are deeply troubling. We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

Id. at 461, 573.

The Supreme Court again remanded the case to the Commission, this time for a third hearing. ORS again propounded more discovery. Another year passed. Then, with a third hearing looming, ORS and the Intervenors finally agreed to settle the case and in doing so affirmed that the full 108.39% increase sought all along by DIUC is "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Settlement Agreement at pp. 5-6; *see also* Order 2021-132. Notably, DIUC's original Application sought revenue $2,267,722. The Settlement revenue number is $2,267,714 – only an $8 difference from the original Application after over six years of litigation required by the ORS and Intervenors' objections to this amount.

DIUC argues that it is constitutionally improper to require the Utility to suffer six years of legal fees, consulting fees, and appeals in order to obtain adequate rates then deny the Utility the right to collect those rates. According to DIUC, the delay in reaching a proper order –no matter the cause– was excessive and not DIUC's fault. ORS and the Intervenors take the position that DIUC should be denied collection of the now agreed upon 108.9% increase for the six years this matter has been in litigation and appeal. As DIUC frames the issue:

> ORS and the Intervenors want this Commission to rule that because ORS and the Intervenors were able to extend this case by six years of costly litigation, they have somehow earned the right to delay implementation of the rates they have now agreed are "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Such a result is contrary to both federal and state law.

DIUC Brief in Support of Request for Reparations at p. 12. The point is well made.

In response to the DIUC Submission, both ORS and the POAs have attempted to focus the Commission on various adjustments and components that make up the 2021 Rates. DIUC argues this is to distract from the fact that both ORS and the POAs have now consented to the 108.9% increase they fought against for the last six years.

ORS, for example, asserts, "While the dollar figure settled upon is nearly equal to the dollar figure that DIUC originally sought, the composition of those rates is substantively different." ORS Brief at 8. The difference that ORS refers to is the fact that a major component of the costs ORS agreed to include in the rates in order to reach the 108.9% increase are Rate Case Expenses that were incurred by DIUC in fighting for incremental 43% increase then the 88.5% increase via two appeals and rehearing. These are the same Rate Case Expenses that ORS partially accepted at the first hearing and then on remand rejected by subjecting DIUC's evidence to "a retaliatory, higher standard of scrutiny on remand." *DIUC II,* 427 S.C. at 464, 832 S.E.2d at 575 (Supreme Court noting "As counsel for ORS conceded, 'The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny.' This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing."). However, ORS admits it did not allow those expenses until after the second remand when it demanded an even higher level of scrutiny and the Commission required DIUC to comply. *See* ORS Brief in Opposition to DIUC Request for Reparations at 9 (citing Commission Order No. 2020-700). ORS asks the Commission to focus on these components of the 108.9%; however, that is unwise as it only highlights the fact that ORS is agreeing to DIUC's original request *and* ORS has again engaged in the same thing the Supreme Court called "retaliatory" and "deeply troubling" and "an unprofessional approach to the legitimate financial interests of South Carolina businesses,

and of South Carolina utility ratepayers." *DIUC II*, 427 S.C. at 463, 832 S.E.2d at 574.

Likewise, the POAs Brief attempts to explain away its recent agreement to DIUC's original 108.9% increase request by making a circular argument that "Revenues are Not Rates". POAs Brief in Opposition to DIUC Request for Reparations at 13. The Brief continues:

> DIUC is correct that its Application sought total operating revenues of $2,267,721, and the Order on Second Rehearing approved total operating revenues of $2,267,714 However, the expenses and assets for which DIUC initially sought approval in its Application are not the same as those approved by the Commission in the Order on Second Rehearing.

Id. at 13 (internal citations omitted). The POAs Brief continues:

> As DIUC knows, the real reason for the similarity between the two numbers is because the "original 108.9% revenue increase that was noticed to the customers in accordance with the 2014 historical test year data ...." provided a "cap" on the amount of revenues the Current Rates could produce.

Id. at FN 5 (internal citations omitted).

It seems this is exactly the point DIUC is making, that ORS and the POAs drove up the Rate Case Expenses over the past 6 years such that rates without all the previous components exceed the 108.9% noticed amount or "cap." The recent Settlement Agreement does allow DIUC to collect costs it incurred during the rate case up to the notice cap. However, that is not advancing DIUC's situation, which is even more reason that the requested reparations are appropriate. DIUC is not being made whole by the new rates.

No matter the semantics employed by the parties, it cannot be denied that after six years of litigation the ORS and POAs have now *actually* agreed that the original 108.9% increase in revenue sought by DIUC from the initial filing of its Application is an appropriate, fair, and just rate increase. S*ee* Order 2021-132, Order Approving Settlement Agreement and Further Procedure, with Settlement Agreement.

Reparations are appropriate in this unique case. Furthermore, the Commission is hesitant

to rule that ORS and a group of intervenors can join forces to cause grossly excessive delay in a proceeding by forcing multiple appeals. The Commission is even more reluctant to rule here that DIUC must bear the burden of the excessive delays. Such a ruling would effectively encourage litigation delay as a tactic to attempt to extort resolution of a rate case. DIUC should not be punished for opposing ORS and Intervenors; likewise, ORS and the Intervenors should not benefit because they were able to collectively stave off a rate increase through litigation, particularly when the Supreme Court has twice unequivocally ruled in DIUC's favor.

2. CONSTITUTIONAL PROTECTIONS REQUIRE THE RELIEF SOUGHT BY DIUC.

The length of this case and the costs DIUC has had to expend to pursue two appeals cannot be wholly addressed by implementation of the 2021 Rates per the Settlement Agreement. Over the past six years of this proceeding, DIUC has been placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling. Therefore, DIUC is entitled to recoup the lost revenues that it should have been able to collect via the requested surcharges.

This conclusion is grounded in the well-established principle that a utility like DIUC has a constitutional right to collect rates that meet minimum constitutional standards of a reasonable return on investment. *See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 at n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va*., 262 U.S. 679, 690, 43 S. Ct. 675 (1923) (explaining that where the rates allowed for a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service…their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."). Complying with this constitutional due process requirement is mandatory and the reasoning is sound – when a utility invests in equipment and real property for use in providing service, the

utility is allowed to charge rates sufficient to allow it to operate and maintain that plant in service.

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory." *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31, 46 S. Ct. 363, 366 (1926) (citing *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 29 S. Ct. 192 (1909) and *Bluefield Waterworks*, 262 U. S. 679, 43 S. Ct. 675. Rates are confiscatory if they do not address the cost of property of the utility and all sums required to meet operating expenses. *Bluefield Waterworks*, 262 U.S. at 691, 43 S. Ct. at 678.

Applying the principle here, DIUC's insufficient rates since Order 2015-846's increase of only 43%, which was mitigated but not corrected by Order 2018-68's 88.5% increase, have not provided DIUC its constitutionally guaranteed just compensation for its property used and its operating expenses, through the duration of this rate proceeding. Mr. Guastella testified in the original hearing about ratemaking and the right of DIUC to earn constitutionally sufficient rates: "Rate regulation is not much lower for a small company than a big company," and it is important to always remember that "the Supreme Court of the United States [has established] that you must give the utility enough revenues to cover its operating expenses and the capital costs of the business, so that it can maintain financial viability and attract capital." Transcript of Proceedings, October 28, 2015 at p.182.[9] Again, "what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *Bluefield*, 262 U.S. at 690, 43 S. Ct. at 678; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 109 S. Ct. 609, 616 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property

[9] In all proceedings to date in this docket, Mr. Guastella has testified as an expert in utility rate setting and utility management based upon his almost 50 years of experience managing water and sewer utilities.

without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

3. ORDERS 2015-846 AND 2018-68 WERE CONFISCATORY.

In the years following *Bluefield*, up until the United States Supreme Court's 1944 decision in *Federal Power Com'n. v. Hope Nat. Gas Co.,* 320 U.S. 591, 64 S. Ct. 281 (1944), "the courts engaged in a detailed review of each of the three major components used in determining a utility's maximum rates: (1) its rate base; (2) the allowed rate of return; and (3) operating expenses" to determine if rates were confiscatory. *See* James M. Van Nostrand, *Constitutional Limitations on the Ability of States to Rehabilitate Their Failed Electric Utility Restructuring Plans*, 31 Seattle U. L. Rev. 593, 596 (2008). In *Hope*, however, the U.S. Supreme Court articulated a much more flexible approach aimed at evaluating the actual impact of rates upon a utility. The Court explained that "when the Commission's order is challenged in the courts, the question is whether that order viewed in its entirety" meets constitutional muster. *Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287–88 (internal quotations omitted).

While the Court also acknowledged that commissions will make adjustments to an application for rate relief, those adjustments *must* be "pragmatic adjustments." *Id.* Therefore, when reviewing a rate order's impact by looking at the order in its entirety to determine whether the rate order is "just and reasonable," the focus of a reviewing court is to be upon "the result reached not the method employed" to achieve the result. *Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287 (holding "the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling"); *see also Duquesne Light Co.*, 488 U.S. at 310, 109 S. Ct. at 617 ("Today we reaffirm these teachings of *Hope Natural Gas:* "[I]t is not theory but the impact of the rate order which counts.").

Applying this result-based analysis to the rates at issue in any case, including this one,

requires the reviewing body to address "the financial integrity of the company whose rates are being regulated … [because] from the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288. This includes evaluating whether the rates provide for sufficient "service on the debt" and also the impact of the rates upon "dividend on the stock" of the utility. *Id.* (citing *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 346, 12 S.Ct. 400, 402 (1892)). To be constitutionally appropriate, the ultimate result of the rates permitted DIUC must be "a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks." *Id.* "That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* (citing *State of Missouri ex rel. South-western Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 291, 43 S.Ct. 544, 547 (1923) (Brandeis, J. concurring). Again, the adjustments creating the rates must be pragmatic. *See Hope Nat. Gas Co.*, 320 U.S. at 602, 64 S. Ct. at 287–88.

In South Carolina the Supreme Court has endorsed the pragmatic (ie, practical) approach to reviewing a rate's overall impact upon a utility. For example, in *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978) the Court quoted *Hope Nat. Gas Co.*:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on debt and dividends on the stock…. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

In 1989 the United States Supreme Court decided *Duquesne Light Co.*, 488 U.S. 299

(1989), and again reaffirmed the ongoing importance of the comparable earnings standard first enunciated in *Bluefield.* *See* Van Nostrand, 31 Seattle U. L. Rev. at 600. "This test states that the 'return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.'" *Id.* (citing *Duquesne Light, 488 U.S. at 310*). Accordingly, "[e]ven though the actions of the Pennsylvania PUC [addressed by the Supreme Court in *Duquesne Light Co.*] did not result in a constitutionally impermissible rate," the Supreme Court's decision in *Duquesne Light Co.* "clarified and confirmed the ability of a utility to assert Takings Clause claims" in order to protect "the utility from the net effect of the rate order on its property."[10]

The record in this case, previous testimony, and filings to date all support the conclusion that the rates permitted in this case were constitutionally insufficient and, as such, the requested relief is necessary to remedy deprivation of DIUC's federal and state constitutional rights.[11] This Commission cannot ignore the facts of this proceeding, including the issues involved and how the Supreme Court addressed them. It is a unique case and without issuing a ruling beyond these facts, it is clear that the requested relief is constitutionally justified. Without recoupment via the requested surcharges, DIUC will suffer a constitutional loss under the Takings Clause.

4. THE RELIEF REQUESTED IS NOT RETROACTIVE RATEMAKING.

In the parties' submissions on the issue of reparations, there is some disagreement about

[10] *Id.* (citing *Duquesne Light Co.*, 488 U.S. at 314 (citing *Bluefield Water*, 262 U.S. at 692-93 ("A public utility is entitled to such rates as will permit it to earn a return ... equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.")).

[11] If a utility regulatory commission fails to grant rate relief in an amount adequate to provide a utility with an opportunity to earn a reasonable return, or denies recovery on a specific utility investment [then the utility's claim is a constitutional claim based on the Takings Clause].") *See, e.g.*, Van Nostrand, 31 Seattle U. L. Rev. at 595.

whether DIUC has argued that the retroactive application of rates has not been addressed by South Carolina courts. It is clear from the filings, however, that DIUC is not asserting there is no South Carolina precedent addressing retroactive ratemaking. Instead, DIUC has accurately asserted that this Commission and our Supreme Court have not specifically addressed the argument framed by ORS that the reparations requested herein constitute retroactive ratemaking.

DIUC frames this portion of its legal arguments as follows:

> The issue currently before the Commission is DIUC's request for reparations and refunds made necessary by the length of this proceeding and the impact of the two appeals.
>
> ***
>
> Although South Carolina courts have not yet addressed this specific issue [of awarding reparations when the actions of the ORS, among others, has extended a rate case excessively and needlessly], other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking.

DIUC Submission in Support of Request for Reparations at p. 12. The issue is clearly articulated, and the discussion related to the same in DIUC's Reply Brief in Support of Request for Reparations is persuasive to this Commission:

> DIUC does not assert South Carolina courts have not addressed the concept of general retroactive ratemaking; additionally, the ORS attempt to reframe DIUC's arguments should not mislead this Commission into thinking that DIUC argues retroactive ratemaking is somehow generally (or specifically) permissible. That is not DIUC's position.
>
> What the ORS and POAs briefs fail to acknowledge or respond to is the constitutional mandate that authorizes and requires the relief DIUC seeks. DIUC's rates for the period at issue were "not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service" and therefore their enforcement deprives [DIUC] of its property in violation of the Fourteenth Amendment." *Bluefield Waterworks*, 262 U.S. at 690, 43 S. Ct. at 675. Furthermore, the ultimate result of the rates for the period at issue was not "a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks." *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288. Accordingly, the rates were not constitutionally sufficient and DIUC is entitled to relief.

DIUC Reply Brief in Support of Request for Reparations at p.5.

ORS opposes the reparations and refunds sought by DIUC based on a theory that the requested relief implicates retroactive ratemaking and "that retroactive ratemaking is prohibited based on the principle that customers who use service provided by a utility should pay for its production rather than requiring future customers to pay for past use." Settlement Agreement at pp. 4-5 (citing *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980)).

The DIUC Submissions are also persuasive to the Commission on this issue. The Commission agrees with DIUC that the relief requested is not retroactive ratemaking.

"The basic premise underlying the prohibition against retroactive ratemaking is that the setting of utility rates is a legislative function, even if carried out by administrative agency; therefore, utility rates, like any other legislation, generally can have only prospective application…." 73B *C.J.S. Public Utilities* §141. Disputes over whether a rate has been applied retroactively can be related to a utility's claim that its rates or revenues are being reduced retroactively or they can be related to a customer's claim that a rate is artificially increased to improperly address some past deficit of the company.

The issue currently before the Commission is DIUC's request for reparations and refunds made necessary by the length of this proceeding and the impact of the two appeals. DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. *See* Constitutional Protections Require the Relief Sought by DIUC, *supra*, and Order 2021-132 at pp. 4-6. DIUC also asserts that the circumstances of this case are unique. Given the positions ORS has taken, the rulings of the Supreme Court, and the length of the proceeding (which is still ongoing), this Commission is confident in approving the requested relief, which is necessary to prevent DIUC from being punished for circumstances it did nothing to create.

Although South Carolina courts have not yet addressed this specific issue, other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking. For example, in *R.R. Comm'n of Texas v. High Plains Nat. Gas Co.*, 628 S.W.2d 753, 754 (Tex. 1981), the Supreme Court of Texas found that "allowing the utility to recover the incremental expenses lost as a result of the improperly mandated ninety percent PGA clause is not retroactive rate relief but restitution of a lost operating cost" that the utility would have been recovering but for the erroneous order reversed on appeal.

Likewise, the Supreme Court of North Carolina has ruled in support of refunds after an appeal (this time for a ratepayer, though the same reasoning applies here). The Court reasoned that ruling against refunds would deny adequate relief appellants who appeal from erroneous orders of the Commission. *See State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina*, 320 S.E.2d 679, 686 (N.C. 1984). Addressing the issue of retroactive ratemaking, the North Carolina Supreme Court focused on the distinction that there can be no retroactive ratemaking until a rate is final. The Court explained, "If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been 'lawfully established' until the appellate courts have made a final ruling on the matter." *Id*. at 67, 685. Therefore, a restitution payment like the one sought here by DIUC cannot by definition be retroactive ratemaking because the rates are not finally established until the appellate process is complete. It should also be noted that ORS and the Intervenors have both agreed "that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary." Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement.

The Supreme Court of New Hampshire has also ruled that the implementation of new rates following appeal does not involve a retroactive application of the law or retroactive ratemaking. In *Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539, 421 A.2d 121, 122–23 (1980), the Court held that "the substitution of new rates in accordance with this court's order for those required by the PUC's earlier order does not involve a retroactive application of the law. Until the rate had become final, the rate established by the PUC had not become tantamount to a statute which could not be amended retrospectively." Likewise, here, there has yet to be a *final* rate such that the concept of retroactive ratemaking would be implicated. Notably, the Court also ruled that the concepts of restitution and unjust enrichment support refunds when a rate decision is altered on appeal:

> In this context, the terms "restitution" and "unjust enrichment" are modern designations for the older doctrine of quasi-contracts, and the action, for "unjust enrichment," therefore, lies in a promise implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him. A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired

Id. at 539-40, 123 (citing 17 *C.J.S. Contracts* s 6 (1963); *Bloomgarden v. Coyer*, 479 F.2d 201, 211 (D.C.Cir.1973); and *Cecio Bros., Inc. v. Town of Greenwich,* 156 Conn. 561, 244 A.2d 404 (1968).

The conclusion that DIUC's requested relief does not implicate retroactive ratemaking because there has been no final rate or conclusion to this matter is further supported by the South Carolina Supreme Court's ruling in *DIUC I* wherein the Court announced:

> Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be

indicative of the current economic realities on remand.

DIUC I, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017). The South Carolina Supreme Court, then, requires the Commission on remand to apply a procedure that is based on the premise that the rate order appealed is not final; additional evidence can be provided as the parties are not bound by the previous record.

The requested relief is not retroactive because the underlying order has not become final.

5. THE ESSENTIAL PUBLIC POLICY CONCERN AGAINST RETROACTIVE RATEMAKING IS NOT IMPLICATED HERE.

As the ORS and POAs point out, a rate is impermissibly retroactive when it requires customers to pay for services that were used by others. *See* ORS Brief at 3 (quoting *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997). This is because of the "general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use." *Id.*; *see also* POA Brief at 14 ("The prospect that a current ratepayer could be responsible for additional charges applicable to a rate for service provided in the past underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina.")

The reparations DIUC seeks will not impose on any customer charges for the usage of water or sewer services by any other customer. Since this proceeding began DIUC has kept records of past payments and refunds to each customer so that precise amounts due for each account can be calculated then billed. That means the actual customers that received the benefit of the 2018 refunds will be notified of the change. Only the customers who actually received water and sewer services from October 1, 2017 until March 1, 2021, at the lower confiscatory rates will be billed for the difference. Each customer's billing will be calculated based upon the services that specific customer consumed, thereby remedying each customer's prior windfall. *See Exhibit*

JFG-RR3 to Testimony of John F. Guastella on Second Rehearing ("As required, DIUC has kept records of payments by each customer so that precise amounts would be charged to each customer.").

The correction requested by DIUC via the surcharges simply would not operate as a retroactive rate does. The requested relief is consistent with the "general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use." *See* ORS Brief at 3 (quoting *Porter*, 328 S.C. at 231, 493 S.E.2d at 97). Accordingly, the requested relief is not barred as a retroactive rate.

6. S.C. CODE § 58-5-240(D) DOES NOT SUPPORT THE EXTREME RESULT ORS SEEKS.

ORS has objected to the relief sought by DIUC citing to S.C. Code § 58-5-240(D). Specifically, ORS asserts that "because DIUC chose not to put its requested (applied for) rates into effect under bond pending resolution of the second appeal, it cannot collect revenues from its customers going forward which it claims to have lost as a result of its decision to not post a bond while the current appeal was pending." Settlement Agreement at p. 4.

Long before the Commission adopted the original ORS-Intervenors Settlement Agreement in Order 2015-846, DIUC informed the Commission and ORS that under ORS's proposed rates DIUC could not meet its financial obligations. *See* DIUC Brief, App. No. 2016-000652 at 25 (quoting Guastella testimony that "We're not going to have any return on equity, and we're not going to be able to make our debt service payments of principal and interest. It would put us right into bankruptcy. We need to have a real decision based on our real costs.") In order to survive, DIUC obtained a bond pursuant to S.C. Code § 58-5-240(D) which permits an appealing utility to "put the rates requested in its schedule into effect under bond … during the appeal and until final disposition of the case."

By the time the Commission was entering its first Order on Rehearing, DIUC had obtained its first bond, then a second renewal bond that required a letter of credit supported by one of its owners, but the second bond was expiring on December 31, 2017 and it was impossible for DIUC to obtain another rate collection bond. The delays of appeal had cost DIUC too much money and its bond was expiring. DIUC had no choice but to implement whatever rate increase the Commission would allow so it could become effective by the January 1, 2018 billing for service provided during the last quarter of 2017. Aware of DIUC's dilemma, on December 20, 2017 the Commission issued its approval of the 88.5% rate increase to be billed with the January 1, 2018 billing.

ORS has asserted that DIUC should not be allowed to collect the requested reparations and/or refunds because DIUC "*chose* not to put its requested (applied for) rates into effect under bond" during the second appeal and subsequent remand and that DIUC's "*decision* not to post a bond" bars DIUC from being made whole. The problem with this assertion is that DIUC had no *choice* about obtaining additional bonds. Because ORS has put DIUC through two years of litigation, ORS effectively exhausted all reserves and DIUC could not obtain further bonds.[12]

The Commission approved DIUC's first bond to be "effective July 1, 2016, for a period of one year." *See* Order 2016-56, March 1, 2016, at p.4. When the bond neared expiration on June 30, 2017, and the first appeal was still pending, the parties agreed to terms for extending a bond for six months, to expire on January 1, 2018. *See* Order 2017-402(a) at p. 2. However, DIUC had no options for further bonds beyond January 1, 2018. It could not renew its previous bonds to cover rates already collected under bond and it could not afford any new bonds to allow collection

[12] The premiums and banking charges paid by DIUC for these bonds total in excess of $60,000. *See* Affidavit of Guastella, October 16, 2017, at p.3, filed with Motion to Reconsider Directives 2017-59-H and 2017-60-H with.

of future rates under an appeal bond.

DIUC explained to the Commission and submitted an Affidavit from Mr. Guastella establishing the facts:

> [T]he surety company is not willing to provide another bond. *See* Guastella Affidavit. In an attempt to obtain bonds, Mr. Guastella contacted Danny Sellers of Insurance Office of America to request a pre-determination of availability of bonds for any post- December 31, 2017, time period. Mr. Sellers arranged for all the previous bonds for DIUC in this matter; however, he responded flatly that there would be no additional bonds issued in this case. *See Attachment A* to Guastella Affidavit ("Our last effort on this was the maximum allowed from the Surety. Sorry we could not be of help.")
>
> In addition to the bonding company's refusal to participate in any additional bond(s) post-December 31, 2017, the prerequisites to obtaining the most recent bonds included substantial financial information, actions, and financial commitments from individuals and entities beyond the control of DIUC. As explained by the Affidavit of Mr. Guastella, those additional funds are no longer available for DIUC's use after December 31, 2017. Also, SunTrust has indicated it will not extend any further credit to DIUC until after this rate case concludes. *See Attachment B* to Guastella Affidavit. So, DIUC cannot provide the security that was originally required for the issuance of the bonds. That does not begin to address the additional bonds that would be necessary to cover rates collected after December 31, 2017. In sum, as the sworn testimony of Mr. Gusatella's Affidavit states, "DIUC is not able to renew its existing bonds or obtain additional bonds for rates charged after December 31, 2017."

Motion to Reconsider Directives 2017-59-H and 2017-60-H with Affidavit of Guastella, October 16, 2017, at p.3.

Having successfully spent DIUC's reserve so that DIUC could not afford to purchase bonds for the second appeal, ORS asks this Commission to blame DIUC for not *choosing* to obtain further bond after the second order on rehearing. To be clear – ORS is actually asking the Commission to rule that ORS can oppose adequate rates for a utility extended periods of time, nearly six years into DIUC's case, thereby forcing the utility to expend its resources on multiple appeals but when the Supreme Court actually rejects every single position asserted by ORS and the case returns on its second remand, the utility must absorb the loss from its inadequate rates unless the utility was

somehow able to pay for appeal bonds pursuant to S.C. Code § 58-5-240(D). ORS wants the Commission to enter this ruling, despite the fact that it would enforce another denial of DIUC's 14th Amendment right to procedural due process. ORS improperly seeks to financially exhaust a utility with appeals then deny the utility any meaningful way to recoup the confiscatory bottom line earnings caused by ORS. This is not a result the Commission will support.

Furthermore, the ruling sought by ORS improperly asks the Commission to distort the purpose and intent of S.C. Code § 58-5-240(D). That provision allows an appealing utility to "put the rates requested in its schedule into effect under bond … during the appeal and until final disposition of the case" and it requires that the collection of higher bonded rates be "conditioned upon the refund … if the rate or rates put into effect are finally determined to be excessive." The statute protects utilities by allowing them to collect sufficient revenues pending appeal. The statute also protects ratepayers by requiring the bond to guarantee funds are available to refund ratepayers if the utility loses its appeal. Those protections are not advanced by what ORS suggests. The statute simply does not apply in any way to justify constitutional deprivation of a utility simply because it could not afford to obtain a bond. Also, there is no ***requirement*** that a utility implement rates under bond in order to be guaranteed proper rates and return under the constitutional standards at issue in this case.

7. THIS COMMISSION HAS THE AUTHORITY TO GRANT THE REQUESTED RELIEF.

The POAs Brief asserts that this Commission lacks the authority to grant the relief DIUC request. *See* POAs Brief at 5 ("the Commission's power to grant reparations must be expressly set out in a particular statute, and cannot be implied from the Commission's general powers"). The Brief goes on to cite to S.C. Code § 58-5-210 for the claim that "There is no express language granting that power in Section 58-5-210…." *Id.*

Contrary to the POAs position, South Carolina courts have routinely held that regulatory bodies, including this Commission, not only possess those powers that statutes explicitly conferred upon them, but ***also*** possess the powers ***implied for those bodies to fulfil their statutorily imposed duties and roles***. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005) (quoting *Captain's Quarters Motor Inn); Hamm v. Cent. States Health & Life Co. of Omaha*, 299 S.C. 500, 506, 386 S.E.2d 250, 254 (1989) ("We find that S.C.Code Ann. § 38–3–110(1) (Supp.1987), which imposes the duty on the [Insurance] Commissioner to supervise and regulate rates, by reasonable and necessary implication, confers the authority upon the Commissioner to make refunds in this case."); 73B C.J.S. Public Utilities § 162 ("A public utilities commission thus possesses such powers and jurisdiction as are thereby conferred expressly by constitutional or statutory provisions or by necessary or fair implication."); and *Riley v. S.C. State Highway Dep't*, 238 S.C. 19, 25, 118 S.E.2d 809, 811 (1961) ("We think the power of condemnation is necessarily implied from the general authority granted under the statutes which we have reviewed.").

In *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948), the Supreme Court had occasion to discuss this Commission's implied powers when considering a challenge to the Commission's practice of transferring franchises related to electric utilities. The question posed was "whether it is within the power of the Public Service Commission to approve, after a hearing, the transfer by a motor freight carrier to another freight carrier of a portion of a certificate of convenience and necessity held by the former." *Beard-Laney, Inc.,* 213 S.C. at 386, 49 S.E.2d at

566. Examining the issue, the Court discussed this Commission's implied powers:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the *field* which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.

Id. at 389, 567.

Likewise, in *City of Columbia v. Bd. of Health & Env't Control*, 292 S.C. 199, 355 S.E.2d 536 (1987), the Supreme Court stressed that "[b]y necessity … a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged." *City of Columbia,* 292 S.C. at 202, 355 S.E.2d at 538. The Court also specifically noted that "delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." *Id.* (citing *In re Review of Health Care Admin. Board,* 83 N.J. 67, 415 A.2d 1147, *appeal dismissed,* 449 U.S. 944, 101 S.Ct. 342, 66 L.Ed.2d 208 (1980).

The reparations DIUC seeks are an action within the express and implied powers of this Commission and, if there is a question of authority, the health and welfare at stake with the Commission's duties justifies liberal construction so as to view implied powers broadly. *See* S.C. Code Ann. § 58-5-210 (Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed…").

Both ORS and the POAs argue that S.C. Code Ann. § 58-5-290 prohibits the relief sought

by DIUC. *See* POAs Brief at 10 and ORS Brief at 3-4. However, in *Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n*, 272 S.C. 81, 248 S.E.2d 924 (1978), the Supreme Court examined Section 58-5-290 and concluded after broadly interpreting the Commission's authority that:

> While it is true the Commission is not a court and does not sit to enforce contractual rights, it is equally true the Commission exercises quasi-judicial powers in the fulfillment of its responsibility under Section 58-5-290 as the arbiter of the reasonableness of rates charged by public utilities.

Carolina Water Serv., Inc., 272 S.C. at 87, 248 S.E.2d at 927. So, contrary to the urgings of the ORS and POAs, the Supreme Court has instructed that in considering S.C. Code § 58-5-290, the Commission should take a broad view of its implied authority. Applying that instruction here, it is clear that the Commission has the authority to act in this instance to protect the rights of DIUC.

The POAs also make an argument that the Commission is not authorized to enter the requested order because in *S.C. Elec. and Gas Co. v. Pub. Serv. Comm'n of S.C,* 275 S.C. 487, 272 S.E.2d 793 (1980), the Supreme Court stated, "The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility."). Again, as previously addressed herein, until the appeals have concluded in this open docket, there is no final order. Additionally, there has been no "lawful rate" established, given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure has not been settled. *See Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), *reh'g denied* (Sept. 27, 2019) ("*DIUC II*") ("The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.").

Also espousing an argument that the Commission is not authorized to act in this matter, the ORS Brief relies upon *S.C. Elec. and Gas Co.* for the incomplete proposition that "'[A]s creatures

of statute, regulatory bodies are possessed of only those powers which are specifically delineated.'"

Reliance by ORS and the POAs on *S.C. Elec. & Gas Co.* is misplaced. In that case the Supreme Court evaluated whether the Commission had the power to award refunds to retail electric customers and ultimately ruled against the refunds. However, that case did not deal with a utility's protected constitutional rights to earn a return on used and useful property or the constitutional requirement that utilities be permitted to earn enough to plan, attract capital, cover operating expense, and earn a profit. *S.C. Elec. & Gas Co.* simply does not contemplate the Commission's authority to award reparations to utilities for confiscatory rates. ORS even admits that *S.C. Elec. & Gas Co*. is not on point, stating that "while the issue in [*S.C. Elec. & Gas Co.]* was a refund a utility was ordered to pay its customers, the reasoning applies with equal force here." ORS Brief at 8. ORS offers no support for this conclusory assertion, except that *S.C. Elec. & Gas Co.* really means more than what it *actually* says. There is only one sentence in *S.C. Elec. & Gas Co*. that uses the word reparations. It reads: "The Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute." *S.C. Elec. & Gas Co.,* 275 S.C. at 491, 272 S.E2d at 795. Again, the issue in *S.C. Elec. & Gas Co.* is simply not the same as the issue before the Commission in this matter. DIUC is not urging the Commission to refund retail electric consumers by way of reparations, which is the <u>only</u> type of reparations that the Court ruled the Commission cannot award in *S.C. Elec. & Gas Co*. The language of the Court's opinion is clear. The holding is specific and limited, as the above quote indicates. Nothing in the opinion states that the Court's holding applies to <u>all</u> types of reparations, or even any type of reparations, particularly the unique relief sough here to protect DIUC from confiscation of property and earnings.

In *Hamm*, 299 S.C. at 502, 386 S.E.2d at 251, the South Carolina Supreme Court reviewed its decision in *S.C. Elec. & Gas Co.*, when considering the very same arguments made by ORS and the POAs here. In *Hamm*, Central States relied on *S.C. Elec. & Gas Co*. to support its position stating that "[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such powers must be expressly conferred by statute." *Id.* at 504, 253. The Court rejected the application of *S.C. Elec. & Gas Co*. and ruled:

> *SCE & G* is easily distinguished from the present case. In *SCE & G,* we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in *SCE & G,* would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful.* As such, a refund in this instance would not be considered retroactive ratemaking.

Id. Having distinguished *S.C. Elec. & Gas Co*. for the same reasons it is inapplicable here, the Supreme Court went on to conclude in *Hamm* that "that S.C. Code Ann. § 38-3-110(1) (Supp.1987), which imposes the duty on the Insurance Commissioner to supervise and regulate rates, by reasonable and necessary implication, confers the authority upon the Commissioner to make refunds in this case." *Id.* at 386, 254. Likewise, here, the previous order in this case was reversed; there has been no "lawful rate" given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure is not settled. *See DIUC II*, 427 S.C. at 464, 832 S.E.2d at 575 ("The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.").

The precedent cited by ORS and the POAs does not support a ruling that this Commission is without authority to provide the relief requested by DIUC.

8. WITHOUT RESTITUTION/REPARATIONS DIUC WILL NOT RECEIVE THE BENEFITS OF JUDICIAL REVIEW.

Without the requested relief, DIUC will have been denied constitutionally appropriate rates

as well as the benefit of meaningful judicial review. *See Pennwalt Corp. v. Michigan Pub. Serv. Comm'n*, 109 Mich. App. 542, 546, 311 N.W.2d 423, 425 (1981) (citing *Mountain States Telephone & Telegraph Co.,* 180 Colo. at 81-82, 502 P.2d at 949 and *Mountain States Telephone & Telegraph Co. v. Arizona Corp. Comm.,* 124 Ariz. 433, 436, 604 P.2d 1144, 1147 (Ariz. App. 1979). The Supreme Court of Illinois also agrees, and in *Indep. Voters of Illinois v. Illinois Com. Comm'n*, 117 Ill. 2d 90, 104, 510 N.E.2d 850, 857 (1987), explained why, holding that after a rate order is judicially set aside, it would be unfair for the party losing the appeal to "continue to benefit from what has been determined to be unlawful portions of a rate increase." ***Even though the statutory provisions in effect in Illinois at the time did not include a specific provision addressing remand refunds/restitution after judicial review, the Court ruled that such a remedy must be available; the absence of such remedies would, according to the Court (and as DIUC asserts here), "raise due process questions."*** *Id.* (double emphasis added) (citing *Appeal of Granite State Electric Co.*, 120 N.H. at 540, 421 A.2d at123 (allowing refunds for the entire period that the rate order was in effect)).

If DIUC is not permitted reparations to address the shortfall in revenues and return created by, among other things, the grossly excessive length of this proceeding and the need for judicial appellate review, then DIUC will not be able to realize the full benefits of judicial review. Failing to grant the requested relief would be contrary to the constitutional rights of DIUC.

9. THE CONCEPTS OF STATUTORY LIMITATION AND RETROACTIVE RATEMAKING MUST GIVE WAY TO PROTECTION OF DIUC'S CONSTITUTIONAL RIGHTS.

Even if the Commission is inclined to lend credibility to the ORS argument that their relief is retroactive ratemaking, the concepts of statutory limitation and retroactive ratemaking must give way to protection of the rights of a utility guaranteed by the Constitution. For example, in *New England Tel. & Tel. Co. v. Pub. Utilities Comm'n*, the Supreme Court of Rhode Island addressed

the rule of retroactive ratemaking and specifically identified the caveat to that rule:

> This holding is accompanied by the caveat that a rate schedule which represents a ***deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates would certainly entitle the company to some sort of extraordinary relief.***

116 R.I. 356, 392, 358 A.2d 1, 22 (1976) (double emphasis added) (citing *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 809 (4th Cir. 1952)); *see also In re Island Hi-Speed Ferry, LLC*, 852 A.2d 524, 533 (R.I. 2004) (discussing and quoting *New England* (when the commission issues "a rate schedule which represents a deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates …" then relief to the utility is authorized and justified); *Accord Bristol County Water Co. v. Harsch,* 120 R.I. 223, 231, 386 A.2d 1103, 1108 (1978) (recognizing exception); *Narragansett Electric Co. v. Burke,* 119 R.I. 559, 569, 381 A.2d 1358, 1363 (1977) (same).[13] There can surely be no doubt among the parties that this lengthy case has covered a "grossly excessive" amount of time thereby delaying final relief to DIUC. Accordingly, the traditional applications of retroactive ratemaking and statutory limitations must give way to protection of DIUC's constitutional rights.

It should also be noted that the *New England* decision explicitly states its ruling is related to appeals necessary to address "good faith errors of the commission." *Id.* In the instant case, the circumstances are more suspect that those referenced in *New England*.

For example, when discussing the status of this proceeding during its second appeal, the South Carolina Supreme Court stated that "[t]he commission is 'vested with power . . . to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to

[13] This also disposes of the POAs' argument that S.C. Code § 58-5-290 prevents the relief sought. *See also* discussion herein, *supra*, regarding S.C. Code Ann. § 58-5-290.

be furnished, imposed, or observed, and followed by every public utility in this State.'" *DIUC II*, 427 S.C. at 463, 832 S.E.2d at 574 (quoting S.C. Code Ann. § 58-3-140(A) (2015)). The Court went on to find that behavior on rehearing following the first remand included "retaliatory actions by ORS" that were "deeply troubling" to the Court because they demonstrated "an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers." *Id.* (emphasis in original). "Likewise," the Court continued, "we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal." *Id.*

The Supreme Court clearly found that the situation and circumstances keeping DIUC from a proper and lawful ruling were grossly excessive and in many ways beyond the "good faith" situation discussed in *New England*. This Commission cannot disagree that this matter has expanded to cover a grossly excessive amount of time. DIUC should not have to bear the burden thereby created and that protection must trump any notions of retroactive ratemaking or other limitations suggested by the ORS and POAs.

10. AMPLE INFORMATION IN THE RECORD SUPPORTS THE REQUESTED RELIEF.

The POAs Brief suggests that the Commission cannot award any relief to DIUC unless the Commission makes additional findings:

> DIUC's arguments that the Subsequently Approved Rates were "insufficient rates" (DIUC Brief, p. 14), "constitutionally insufficient" (DIUC Brief, p. 16), violated "DIUC's federal and state constitutional rights" (DIUC Brief, p. 17), or otherwise improper are bare assertions and nothing more. There has been no finding from this Commission addressing or granting any such claim. More particularly, those factual *claims* that would presumably support its Request have not been adopted as *findings* by this Commission.

POA Brief at 12.

The solution to this alleged problem is simple – the Commission need only look to the

record in this proceeding for ample support. For example, the Second Rehearing Testimony of Mr. Guastella, filed with the Commission on June 16, 2020, presents support for any findings the Commission may wish to make. That testimony addresses a variety of topics and constitutes the unchallenged facts as to these issues:

Page 15:	How DIUC implemented the rates allowed by Order 2015-846 and Order 2018-68 and the missed income.
Page 16:	The rate setting mechanisms DIUC asks the Commission to apply to address the shortfalls created by Orders 2015-846 and 2018-68.
Page 18:	Calculation of the impact of the grossly excessive delay in implementing proper rates for DIUC.
Page 18:	Mr. Guastella's expert opinion as to whether DIUC has been permitted to implement constitutionally sufficient rates.
Exhibits:	Exhibit JFG-RR1, Motion and Proposed Order Exhibit JFG-RR2, Schedule for Second Rehearing, Exhibit JFG-RR3, Schedule for Remediation/Reparation, and Exhibit JFG-RR4, Revenue Shortfall. Exhibit JFG-RR5, Return Deficiency Calculation

See Testimony of John F. Guastella on Second Rehearing with Exhibits, June 16, 2020.

There is ample information in the record and included in this Order to support the relief herein granted.

CONCLUSION

DIUC has a constitutional right to collect revenues sufficient to cover operating expenses and to allow DIUC to earn a reasonable return on investment. DIUC did not forfeit its rights when circumstances beyond its control extended this case over an expanse of six years. Because of the grossly excessive delays of this proceeding, DIUC did not collect revenues sufficient to cover operating expenses and to allow DIUC to earn a reasonable return on investment. Therefore, under the unique facts of this case, relief is in order.

WHEREFORE, the Commission herewith grants DIUC's Request for Reparations and orders that DIUC shall proceed with calculating the amounts to be billed to the continuing customers of the utility that received the benefit of the previous refund and the benefit of DIUC's services at the lower, unconstitutional rates for the period herein defined, specifically:

1. DIUC may implement a surcharge to collect the 108.9% increase it should have been allowed beginning on October 1, 2017, through March 1, 2021. A surcharge may be added to customer bills to recover the shortfall in revenues and return on investment for that period of time, with interest at the allowed 9.31% equity return.

2. Because the 108.9% increase was not allowed to begin on October 1, 2017, DIUC gave certain credits/refunds to customers in their January 1, 2018, billing. DIUC may implement a one-time surcharge for reimbursement of the credit/refund made to the customers with the January 1, 2018, billing, with interest at the allowed 9.31% equity return.

3. Pursuant to the terms of the Settlement Agreement, DIUC shall submit the calculation of the amount of the surcharges to individual customers for review by ORS. Within 14 days of receipt of the same. ORS shall notify the Commission if there is a dispute as to the amount of the surcharges or their implementation and specify the grounds for the dispute.

It is so ordered.

BY ORDER OF THE COMMISSION:

_____
Chairman

ATTEST:

_____
Vice Chairman